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Low Thiam Hock v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL NO W-05–262–05 OF 2018
RHODZARIAH BUJANG, HAS ZANAH MEHAT AND ABU BAKAR JAIS JJCA
9 MARCH 2021

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Criminal Law — Revision — Application for revision — Appellant applied for revision of sessions court's decision in High Court — High Court dismissed appellant's application for revision — Appellant convicted for offence under s 84(1) of the Securities Industry Act 1983 — Appellant sentenced to fine of RM5m and five years of imprisonment — The appellant filed revision application to examine the records or notes of proceedings of sessions court to satisfy correctness of conviction and sentence imposed by sessions court — Whether sessions court judge had ascertained accuracy and reliability of transcript or notes of proceedings — Whether transcript or notes of proceedings had been authenticated by learned sessions court judge — Whether decision of revision application could be appealed to Federal Court as it came from sessions court in its original criminal jurisdiction — Criminal Procedure Code s 272F(3), (4)

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This was an appeal against the decision of the High Court in refusing the appellant's application for revision ('the application'). The appellant was convicted by the sessions court for a criminal charge of an offence under s 84(1) of the Securities Industry Act 1983. The appellant was sentenced to a fine of RM5m and five years of imprisonment. The appellant filed an appeal to the High Court. Before the appeal could be heard at the High Court, the appellant filed the application to examine the records or notes of proceedings of the sessions court to satisfy itself of the correctness of the conviction and sentence imposed by the sessions court. The High Court found that there were essentially two sets of notes of proceedings, the first one was signed and certified by the learned sessions court judge and the second set notes of proceedings were included in the record of appeal prepared by the sessions court including the agreed notes between the parties. The appellant contended that the first set notes of proceedings should be accepted, not the second set of the notes. For the present appeal, the appellant argued that the two sets of notes of proceedings would prejudice the appellant greatly in the appeal proper against conviction and sentence. The issues for the determination by the court were: (a) whether the sessions court judge had ascertained the accuracy and reliability of such transcript or notes of proceedings as stipulated in s 272F(3) of the Criminal Procedure Code ('the CPC'); and (b) whether the transcript or notes of proceedings had been authenticated by the sessions court judge

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pursuant to s 272F(4) of the CPC. Another issue for determination of the court was whether the decision of the revision application could be appealed to the Federal Court as it came from the sessions court in its original criminal jurisdiction.

Held, dismissing appeal:

(1) It could not be denied that the relevant notes of proceedings were agreed by the appellant. The sessions court judge clearly had stated in the grounds of judgment that the notes of proceedings were agreed by both parties. The appellant could not object on the notes because the appellant had agreed to the notes of proceedings. In that regard, the High Court could not be wrong to find that the sessions court judge had ascertained the accuracy and reliability of the transcript or notes of proceedings because the learned had greatly been assisted in determining the accuracy and reliability of such transcript or notes of proceedings because the appellant himself had agreed to these notes. The sessions court judge was aptly rest assured on the accuracy and reliability of the notes because the appellant himself had unselfishly agreed to these notes. The appellant was assisted by competent counsel before he agreed to the notes and the appellant agreed to these notes too knowing fully well he could use these notes for the appellant's defence. The High Court was not wrong to say that in reference to s 272F(3) of the CPC, what was required of the learned sessions court judge was only to ascertain the accuracy and reliability of the notes. The High Court was correct in finding the sessions court judge had indicated he would only be relying on the agreed notes of proceedings before making the decision. The court was satisfied that the sessions court judge had referred to the complete notes of proceedings in convicting and sentencing the appellant. It was proven when the sessions court judge had used technical terms in the grounds of judgment. The technical terms were obtained and reflected in the complete notes of proceedings and without the complete notes of proceedings, it would not be possible to use these technical terms in the grounds of judgment (see paras 44–45 & 50).

(2) It was found the High Court judge did not err, in reference to s 272F(4) of the CPC, to find that the provision did not state how the transcript ought to be signed. The statutory provision did not state whether it must be signed at the end of every trial. The authentication was only for the signature or even just an acknowledgment in any form by the sessions court judge on the notes of the proceedings. The court was of the considered view that it was acceptable for just one signature or acknowledgement in any form of the sessions court judge for all these notes of proceedings. The signature of the same signifying authentication should be secondary to the act of declaring the notes are indeed genuine and authentic. The authoritative certification of the correctness of the

notes of proceedings in that sense becomes more relevant in this respect. There should not be any doubt on it as the notes of proceedings was agreed. It could not be disputed the sessions court judge did authenticate the notes of proceedings, albeit not for every trial date. The session court judge, as found by the , High Court judge relied on the correct, accurate and authenticated notes of proceedings and had thus complied with both s 272F(3) and (4) of the CPC. In any case, the issue as to the existence of two sets of notes of proceedings had become irrelevant when the parties had agreed to adopt the agreed notes and used them for their submissions before the decision was delivered by the session court judge (see paras 52–54 & 61–62).

(3) A revision was normally applied to avoid grave injustice from happening considering the exigency of time and was not meant to be applied when there was already an appeal pending as happened here. More so when there was no bar for the appellant to raise the issue regarding the notes of proceedings in the appeal proper. By filing this application, the appellant had chosen a longer route in disposing his case at the appellate stage. In that sense, his complaint that he had faced the charge for many years, and would have to wait for more time for its disposal, seemed misplaced. He had chosen the longer route and had brought the predicament onto himself (see paras 71–72 & 76).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang menolak permohonan perayu untuk semakan ('permohonan tersebut'). Perayu telah disabitkan oleh mahkamah sesyen bagi pertuduhan jenayah atas kesalahan di bawah s 84(1) Akta Perindustrian Sekuriti 1983. Perayu dijatuhkan hukuman denda RM5 juta dan lima tahun penjara. Perayu mengemukakan rayuan ke Mahkamah Tinggi. Sebelum rayuan dapat didengar di Mahkamah Tinggi, perayu memfailkan permohonan untuk memeriksa rekod atau nota prosiding mahkamah sesyen untuk memastikan kebenaran sabitan dan hukuman yang dijatuhkan oleh mahkamah sesyen. Mahkamah Tinggi mendapati bahawa pada asalnya terdapat dua set nota prosiding, yang pertama ditandatangani dan diperakui oleh hakim mahkamah sesyen yang bijaksana dan nota prosiding yang kedua dimasukkan dalam rekod rayuan yang disediakan oleh mahkamah sesyen termasuk nota yang dipersetujui antara pihak-pihak. Perayu berpendapat bahawa set nota prosiding pertama harus diterima pakai, bukannya set nota kedua. Untuk rayuan semasa, perayu berpendapat bahawa dua set nota prosiding tersebut akan memprejudiskan perayu dalam rayuannya terhadap sabitan dan hukuman secara wajar. Isu-isu untuk untuk ditentukan oleh mahkamah adalah: (a) sama ada hakim mahkamah sesyen telah memastikan ketepatan dan kebolehpercayaan transkrip atau nota prosiding tersebut seperti yang diperuntukkan dalam s 272F(3) Kanun Tatacara Jenayah ('KTJ'); dan (b) sama ada transkrip atau nota prosiding tersebut telah disahkan

oleh hakim mahkamah sesyen berdasarkan s 272F(4) KTJ. Isu lain untuk ditentukan oleh mahkamah adalah sama ada keputusan permohonan semakan tersebut dapat dirayu ke Mahkamah Persekutuan kerana keputusan tersebut adalah dari mahkamah sesyen dalam bidang kuasa jenayah asalnya.

Diputuskan, menolak rayuan:

(1) Ianya tidak dapat dinafikan bahawa nota prosiding yang berkenaan telah dipersetujui oleh perayu. Hakim mahkamah sesyen telah menyatakan dengan jelas dalam alasan penghakiman bahawa nota prosiding tersebut telah dipersetujui oleh kedua-dua pihak. Perayu tidak dapat membantah nota tersebut kerana perayu telah bersetuju dengan nota prosiding tersebut. Sehubungan dengan itu, Mahkamah Tinggi tidak terkhilaf dalam dapatan bahawa hakim mahkamah sesyen telah memastikan ketepatan dan kebolehpercayaan transkrip atau nota prosiding kerana yang bijaksana telah banyak dibantu dalam menentukan ketepatan dan kebolehpercayaan transkrip atau nota prosiding tersebut kerana perayu sendiri telah bersetuju dengan nota-nota ini. Hakim mahkamah sesyen begitu yakin akan ketepatan dan kebolehpercayaan nota tersebut kerana perayu sendiri tanpa kepentingan bersetuju dengan nota ini. Perayu telah dibantu oleh peguamcara yang cekap sebelum beliau bersetuju dengan nota tersebut dan perayu juga bersetuju dengan nota-nota ini dengan mengetahui sepenuhnya bahawa beliau boleh menggunakan nota ini untuk pembelaan perayu. Mahkamah Tinggi tidak terkhilaf untuk mengatakan bahawa merujuk pada s 272F(3) KTJ, apa yang diperlukan oleh hakim mahkamah sesyen yang bijaksana hanyalah untuk memastikan ketepatan dan kebolehpercayaan nota tersebut. Mahkamah Tinggi telah dengan tepat dalam dapatan bahawa hakim mahkamah sesyen telah menunjukkan bahawa beliau hanya akan bergantung pada nota prosiding yang dipersetujui sebelum membuat keputusan. Mahkamah telah berpuas hati bahawa hakim mahkamah sesyen telah merujuk kepada nota prosiding yang lengkap dalam menjatuhkan sabitan dan hukuman kepada perayu. Ini terbukti apabila hakim mahkamah sesyen telah menggunakan istilah teknikal dalam alasan penghakiman. Istilah teknikal telah diperoleh dan dicerminkan dalam nota prosiding yang lengkap dan tanpa nota prosiding yang lengkap, ianya mustahil untuk menggunakan istilah teknikal ini dalam alasan penghakiman (lihat perenggan 44–45 & 50).

(2) Ianya telah menjadi dapatan bahawa hakim Mahkamah Tinggi tidak terkhilaf, merujuk kepada s 272F(4) KTJ, dalam menentukan bahawa peruntukan tersebut tidak menyatakan bagaimana transkrip tersebut harus ditandatangani. Peruntukan undang-undang tidak menyatakan sama ada ia mesti ditandatangani pada akhir setiap perbicaraan. Pengesahan tersebut hanya untuk tandatangan atau sekadar pengakuan dalam bentuk apa pun oleh hakim mahkamah sesyen berkenaan nota

prosiding. Mahkamah berpendapat bahawa ianya boleh diterima hanya dengan satu tandatangan atau pengakuan dalam apa jua bentuk oleh hakim mahkamah sesyen untuk kesemua nota prosiding ini. Tandatangan padanya sebagai pengesahan haruslah dipertimbangkan sebagai tindakan sekunder kepada menyatakan bahawa nota tersebut memang asli dan sahih. Pengesahan secara autoritatif pada kebenaran nota prosiding dalam pengertian tersebut menjadi lebih relevan dalam hal ini. Seharusnya tidak ada keraguan padanya kerana nota prosiding telah dipersetujui. Ianya tidak dapat dipertikaikan bahawa hakim mahkamah sesyen telah mengesahkan nota prosiding, walaupun tidak untuk setiap tarikh perbicaraan. Hakim mahkamah sesyen, seperti dapatan oleh hakim Mahkamah Tinggi, bergantungan pada kebenaran, ketepatan dan kesahihan nota prosiding tersebut dan dengan demikian telah mematuhi kedua-dua s 272F(3) dan (4) KTJ. Dalam hal lain, isu berkenaan terdapat dua set nota prosiding menjadi tidak relevan apabila pihak-pihak telah bersetuju untuk mengguna pakai nota yang dipersetujui dan menggunakannya untuk penghujahan mereka sebelum keputusan tersebut disampaikan oleh hakim mahkamah sesyen (lihat perenggan 52–54 & 61–62).

(3) Suatu semakan biasanya diguna pakai untuk menghindari ketidakadilan yang besar dari terjadi berdasarkan keadaan masa yang mendesak dan tidak dimaksudkan untuk diguna pakai apabila terdapat rayuan belum diputuskan seperti yang terjadi di sini. Lebih-lebih lagi apabila tidak ada halangan bagi perayu untuk membangkitkan isu mengenai nota prosiding dalam rayuan yang teratur. Dengan memfailkan permohonan ini, perayu telah memilih jalan yang lebih panjang dalam melupuskan kesnya di peringkat rayuan. Dalam pengertian itu, aduannya bahawa beliau telah menghadapi pertuduhan selama bertahun-tahun, dan harus menunggu lebih lama untuk pelupusannya, nampaknya tersalah arah. Beliau telah memilih jalan yang lebih panjang dan membawa kesulitan tersebut pada dirinya sendiri (lihat perenggan 71–72 & 76).]

Cases referred to

Abdol Rahim Zamani Mohammad Ali lwn Pendakwa Raya dan satu lagi rayuan [2015] MLJU 2185; [2015] 8 CLJ 990, CA (distd)
Dorai Manickam alias Davis v Rex [1936] 1 MLJ 209 (refd)
Home v Hardy 1842 D 261 (refd)
Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69; [1987] 1 CLJ 35, SC (refd)
Lipa ak Liban v PP [2013] 10 MLJ 116, HC (distd)
Muzammil Izat bin Hashim v PP [2003] 6 MLJ 590; [2009] 2 CLJ 354, HC (refd)
PP v Ishak bin Hj Shaari & other appeals [2003] 4 MLJ 585, CA (refd)
R v Payne; R v Spillane [1971] 3 All ER 1146, CA (distd)
Set Kon Kim v Officer in Charge, Ceras Police Station [1984] 1 MLJ 73 (refd)

A *Tan Sri Eric Chia Eng Hock v PP (No 1)* [2007] 2 MLJ 101; [2007] 1 CLJ 565, FC (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 31, 35, 87(1)
B Criminal Procedure Code ss 272F, 272F(3), (4), 274(4)
Extradition Ordinance 1958 s 15
Securities Industry Act 1983 (repealed by Capital Markets and Services Act 2007) s 84(1)

C **Appeal from:** Criminal Appeal No WA-44–157–09 of 2017 (High Court, Kuala Lumpur)

Muhmmad Shafee bin Abdullah (Sarah Abishegam, New Sin Yew, Joshua Tay and Chan Yen Hui with him) (Chan Yen Hui) for the appellant.
D *Roz Mawar Rozain (Izuddin Mohamed and Raihana Nadhira Rafidi with her) (Deputy Public Prosecutor, Securities Commission Malaysia) for the respondent.*

Abu Bakar Jais JCA:

E INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge ('HCJ') who had refused the application for revision ('application') by the appellant. We heard the parties orally, considered their written submissions and
F perused the appeal records before we unanimously dismissed the appeal.

[2] An appeal has been lodged by the appellant to the Federal Court against our decision. We shall now explain the reasons for the dismissal of the appeal.

G BACKGROUND FACTS

[3] The appellant was convicted by the learned sessions court's judge ('SCJ') for a criminal charge of an offence under s 84(1) of the Securities
H Industry Act 1983 and the charge reads as follows:

> That you on 3 December 1997 between 11:00 am to 5:00 pm at Sime Securities Sdn Bhd, 21st Floor, Bangunan Sime Bank, 4 Jalan Sultan Sulaiman, 50000 Kuala Lumpur in the Federal Territory of Kuala Lumpur, instructed a dealer's representative of Sime Securities Sdn Bhd to purchase Repco Holdings Berhad
I shares by taking up any offer prices of the said shares offered by sellers on the Kuala Lumpur Stock Exchange during the time in question, which act was calculated to create a misleading appearance with respect to the price of Repco Holdings Berhad shares on the Kuala Lumpur Stock Exchange and you have thereby committed an offence under section 84(1) of the Securities Industry Act 1983 punishable under section 91 of the same Act.

[4] He was sentenced to a fine of RM5m and five years of imprisonment by the learned SCJ.

[5] He filed an appeal to the High Court. Before the appeal could be heard at the High Court, he filed the application pursuant to ss 31 and 35 of the Courts of Judicature Act 1964 ('the CJA'), seeking as follows (in verbatim):

(a) Bahawa rekod prosiding Mahkamah Sesyen di dalam kes Perbicaraan Jenayah No 62–138–1999 dipanggil dan diperiksa bagi tujuan Mahkamah yang Mulia ini memuaskan hatinya tentang ketepatan, keesahan atau kewajaran perintah sabitan dan perintah hukuman yang telah dijatuhkan pada 11.1.2016 dan 29.2.2016 masing-masing ke atas Pemohon dan tentang keteraturan prosiding Mahkamah Sesyen di dalam kes Perbicaraan Jenayah No 62–138–1999;

(b) Bahawa perintah-perintah Mahkamah Sesyen yang diberikan pada 11.1.2016 yang mensabitkan Pemohon/Perayu dengan kesalahan di bawah seksyen 84(1) Akta Perindustrian Sekuriti 1983, dan pada 29.2.2016 yang menjatuhkan hukuman penjara 5 tahun dan denda RM5,000,000.00 (jika gagal bayar penjara selama 5 tahun terhadap Pemohon/Perayu) disemak (revise) dan diketepikan dan selanjutnya, bahawa Pemohon/Perayu dilepaskan dan dibebaskan;

(c) Secara alternatif kepada perenggan 2 di atas, perintah-perintah Mahkamah Sesyen yang diberikan pada 11.1.2016 yang mensabitkan Pemohon/Perayu dengan kesalahan di bawah seksyen 84(1) Akta Perindustrian Sekuriti 1983, dan pada 29.2.2016, yang menjatuhkan hukuman penjara 5 tahun terhadap (Pemohon/Perayu) disemak (revise) dan diketepikan dan selanjutnya, bahawa kes Perbicaraan Jenayah No 62–138–1999 dibicarakan semula oleh Hakim Mahkamah Sesyen yang lain;

(d) Perintah-Perintah dan/atau relif-relif lain yang dianggap suai–manfaat dan adil oleh Mahkamah yang Mulia ini.

[6] The learned HCJ dismissed the application. This became the subject of the present appeal.

AT THE HIGH COURT

[7] As narrated above, the main prayer for the application was for the High Court to examine the records or notes of proceedings of the sessions court to satisfy itself of the correctness of the conviction and sentence imposed by the sessions court.

[8] Before the High Court, there was also a preliminary objection raised by the public prosecutor ie the respondent, against the application. The preliminary objection raised the argument that the application was vexatious

and an abuse of the court process as the issues in the application arose as early as 12 August 2016 and the appellant had filed a petition of appeal on 14 July 2017 but had not at all, raised in the petition, the issues in this application. The preliminary objection also pertained to the contention that since the date of the appeal against conviction and sentence had been scheduled for hearing at the High Court on 6, 9 and 10 November 2017, the issues in the application should be argued in this appeal against conviction and sentence (appeal proper).

[9] The learned HCJ was of the view that the main issue in the application was whether the decision of the learned SCJ to convict and sentence the appellant was based on the correct notes of proceedings.

[10] The learned HCJ found there were essentially two sets of notes of proceedings. The first was signed and certified by the learned SCJ. The notes were also sent to the appellant's solicitors on 21 June 2016.

[11] The second set of notes of proceedings were included in the record of appeal prepared by the sessions court. This set included the agreed notes between the parties. This agreed notes came about because the case was technical and parties agreed to the same for the purpose of preparing written submissions by both sides.

[12] The second set of notes of proceedings was only signed and certified as follows:

(a) the notes of proceedings during mentions on 7 March 2013–24 September 2019; and

(b) the notes of proceedings for the trial dates on 18 July 2014 (Vol 2(i)) p 1674 and on 17 September 2014.

[13] The notes of proceedings for 25 trial dates were not signed and certified by the learned SCJ.

[14] Therefore, the appellant contended the first set of notes of proceedings should be accepted but not the second set of the notes. The first set of notes of proceedings was termed as the official notes. However, because there were two sets of notes, the appellant submitted it could not be ascertained as to which set of notes had been used by the learned SCJ in arriving at the decision to convict and sentence the appellant. The two sets of notes meant that there was a doubt on the reliability of these notes and the appellant would be handicap in the appeal at the High Court as all parties could not say for certain which notes should be used for the appeal. It was also contended the irregularity with regard to the notes of proceedings could not be cured. Further, it was also submitted,

this was prejudicial to the appellant. Therefore, it was argued by the appellant, the High Court should use its discretionary and supervisory powers to acquit and discharge the appellant, instead of proceeding with the hearing of the appeal.

[15] At the High Court, it was also contended that the applicant stood more than 18 years facing the prosecution and therefore to order a retrial at the sessions court would not be fair to him.

[16] The respondent on the other hand provided the High Court with the chronology of events in support of the submission to dismiss the application. Of significance, the chronology showed that on 5 May 2015, the learned SCJ endorsed the agreed notes of proceedings, after parties were instructed to come up with the agreed notes. On 11 January 2016, the appellant was convicted for the offence after submissions by parties. On 20 January 2016 the appellant filed the appeal against conviction to the High Court. And on 29 February 2016 he was sentenced accordingly. The appellant then filed an appeal against sentence on 2 March 2016. Thereafter parties agreed the notes of proceedings were not in order and sought a meeting with the learned SCJ who granted the meeting. On 7 September 2017, the appellant confirmed having the complete appeal records. Therefore, the deputy registrar fixed 16 October 2017 for written submissions to be filed and 23 October 2017 for replies if any. On 26 September 2017, the appellant filed the application at the High Court.

[17] The learned HCJ found that the learned SCJ had referred to all correct notes of proceedings as agreed to by the parties before making his decision. It was also found that the learned SCJ took into account the submissions of both parties in arriving at his decision. The learned HCJ also found that the learned SCJ had written a lengthy grounds of judgment, analysing both the prosecution's case and the defence of the appellant.

[18] The learned HCJ noted that the trial was completed on 17 September 2014 at the sessions court and the decision was delivered by the learned SCJ more than a year later ie on 11 January 2016. This was because the parties were working together and needed much longer time to ensure the finality of the correct, accurate and complete notes of proceedings, which was then authenticated by the learned SCJ.

[19] The learned HCJ also noted that the learned SCJ in his grounds of judgment, stated before making his decision, he had the agreed set of notes of proceedings. Therefore, the learned HCJ found the appellant erred to contend the learned SCJ had not directed his mind to the correct set of notes of proceedings.

[20] In reference to s 272F(4) of the Criminal Procedure Code ('the CPC'), the learned HCJ also found that this provision does not state how the transcript (notes of proceedings) ought to be signed. It also does not state whether it must be signed at the end of every trial.

[21] In reference to s 272F(3) of the CPC, the learned HCJ found that what is required of the learned SCJ was only to ascertain the accuracy and reliability of the notes of proceedings. And in this regard, the learned SCJ had indicated he will only be relying on the agreed notes of proceedings before making his decision.

[22] As for the second set of notes of proceedings, the same was found by the learned HCJ to be used in the appeal based on corrections if any to perfect the notes (p 24 of the learned HCJ's grounds of judgment). The learned HCJ also found the second set of notes of proceedings was substantially only to improvise and correct grammatical errors. The learned HCJ also said that it is not uncommon for the appeal record to be corrected to reflect the actual evidence tendered. This does not mean the notes of proceedings were not referred at all by the sessions court.

[23] In reference to the case *Abdol Rahim Zamani Mohammad Ali lwn Pendakwa Raya dan satu lagi rayuan* [2015] MLJU 2185; [2015] 8 CLJ 990, referred by the appellant, the learned HCJ found the facts in this case were different from the facts in the present case. In this case, there were discrepancies between the notes of proceedings by the trial judge and the court recording transcription. And the Court of Appeal in this case found the trial judge was wrong because he had relied on the wrong notes of proceedings.

[24] However, these facts were different according to the learned HCJ from the facts of the present case because in the present case the learned SCJ had relied on the notes of proceedings which were agreed by both parties. And the learned SCJ had on 5 May 2015, endorsed the agreed notes of proceedings. Therefore, it could not be said that the wrong notes of proceedings were used in arriving at the decision to convict and sentence the appellant.

[25] The learned HCJ also found the case *R v Payne; R v Spillane* [1971] 3 All ER 1146, referred by the appellant, not applicable because of the different facts of the case. In this case a shorthand writer was present in court but the notes were inadequate and the recording of such notes was not accurate. Thus, the facts here were different from the present case where parties agreed to the notes of proceedings before the learned SCJ gave his decision.

[26] Similarly, the learned HCJ found the case of *Lipa ak Liban v Public Prosecutor* [2013] 10 MLJ 116 also referred by the appellant, distinguishable in

facts with the present case. In *Lipa ak Liban*, the first set of records of appeal was incomplete as some exhibits were not included. Subsequently a supplementary record of appeal containing all the exhibits was made available except the amended charge. In this case, the High Court exercised its revisionary power and acquitted and discharged the accused because the amended charge was not included in the appeal record.

[27] In the present case, the learned HCJ also said just because the amended charge was not included in *Lipa ak Liban*, the court could not similarly acquit and discharge the appellant. The learned HCJ said an adjournment should be granted to include the amended charge in the appeal record in *Lipa ak Liban*. And the accused in *Lipa ak Liban* could not be prejudiced as he must have been aware of the amended charge against him. Therefore, the learned HCJ refused to follow this case which after all is not binding on him.

[28] Considering the application, facts of the case and submissions of the parties, on the whole, the learned HCJ decided that the application was without any merits and accordingly dismissed the same.

THE APPELLANT'S SUBMISSIONS

[29] For the present appeal, the appellant essentially argued that the two sets of notes of proceedings will prejudice him greatly in the appeal proper against conviction and sentence. There were discrepancies between the two sets of notes of proceedings and the learned SCJ failed to ensure the reliability and accuracy of the applicable notes of proceedings.

[30] The appellant submitted the learned SCJ could not endorse two different sets of notes of proceedings. The learned SCJ also wrongly endorsed only two trial dates when there were more than twenty trial dates.

[31] It was further submitted by the appellant that the irregularity in this regard could not be cured as it had prejudiced the appellant. The notes contained many errors particularly in respect of the evidence of the appellant's expert witness SD5 who gave technical evidence.

[32] It was also contended by the appellant that there was no indication when the notes of proceedings prepared by the respondent and agreed by the appellant, were given to the sessions court. The sessions court did not ascertain the accuracy and reliability of these agreed notes of proceedings pursuant to s 272F(3) of the CPC. The agreed notes also did not follow the requirement of s 272F(4) of the CPC.

[33] Further, the appellant disputed the accuracy of the first set notes of proceedings and contended there was no ruling when this set of notes was expunged and when this set became the official notes.

[34] The appellant also submitted that this case has taken so long that it would not be appropriate to order a retrial. What should be ordered is an acquittal and discharge of the appellant against the charge.

THE RESPONDENT'S SUBMISSIONS

[35] The learned SCJ had referred to the complete notes of proceedings in convicting and sentencing the appellant. The learned SCJ was the only judge presiding over the entire defence case. He had the benefit of hearing the whole of the defence's case, both for oral and documentary evidence. The parties had taken about six months to agree to the complete notes of proceedings. The CRT system showed that the complete notes of proceedings were referred during the submissions stage by both parties and also during clarification before the learned SCJ.

[36] The learned SCJ clearly stated in his grounds of judgment that the notes of proceedings were agreed by both parties in this case. This is proven when he had used technical terms in his grounds of judgment which were only mentioned in the complete notes of proceedings.

[37] The learned HCJ had considered all these and concluded the learned SCJ had referred to the complete notes of proceedings. The learned HCJ had correctly stated in his grounds of judgment, it took more than a year for the decision to be given after the trial was completed at the sessions court because both the appellant and respondent were working together in ensuring a complete and accurate notes of proceedings which were then authenticated.

[38] It is incorrect for the appellant to contend because the first appeal records contained incomplete notes of proceedings, the learned SCJ had relied on such notes in coming to his decision. The learned HCJ had correctly indicated in his grounds of judgment it is not uncommon for the notes to be corrected at a later date to reflect the actual evidence given.

[39] Section 272F(4) of the CPC clearly is silent as to how the transcript (the notes of proceedings) must be signed. It is also silent whether it must be signed at the end of every relevant trial date. Therefore it would be sufficient for one signature of the judge to be shown for the whole transcript.

[40] The complete agreed notes of proceedings were collated and bounded into three volumes. As these were prepared and agreed by parties, obviously

there is no computerised printed signature of the learned SCJ. However, it must be appreciated that the complete agreed notes of proceedings were endorsed by the learned SCJ on 5 May 2015. This would indicate the learned SCJ had ascertained the accuracy and reliability of the notes.

[41] These three volumes of the complete and agreed notes were relied on and referred by the appellant at all times during submission and clarification at the sessions court. This is reflected in the transcript on 10 August 2015.

OUR DECISION

[42] The starting point in explaining the reasons for our decision, based on the contentions of both parties in respect of the dispute regarding the notes of the proceedings is the scope and interpretation of s 272F of the CPC that states as follows:

> (1) Where any proceedings before any Judge or Magistrate are recorded by any mechanical means, the Judge or Magistrate shall cause the electronic record of such proceedings to be transcribed by any person authorized in writing by the Judge or Magistrate.
>
> (2) Where any person authorized to transcribe under subsection (1) is not a public servant, such person shall be deemed to be a public servant within the meaning of the Penal Code [Act 574] while discharging his duties as such transcriber.
>
> (3) Upon the production of the transcript by any person authorized under subsection (1), the *Judge or Magistrate shall ascertain the accuracy and reliability of such transcript* and where the Judge or Magistrate makes a ruling that any evidence recorded is inadmissible or irrelevant and shall not form part of the record of proceedings, he may direct that the electronic record of such evidence be excluded from the record of proceedings.
>
> (4) *The transcript shall be authenticated by the signature of the Judge or Magistrate*. (Emphasis added.)

[43] In respect of this statutory provision, the main contention involves two issues as follows:

(a) whether the learned SCJ had ascertained the accuracy and reliability of such transcript or notes of proceedings as stipulated in s 272F(3) of the CPC above; and

(b) whether the transcript or notes of proceedings had been authenticated by the learned SCJ pursuant to s 272F(4) of the CPC also as shown above.

[44] In respect of the first issue above, it could not be denied that the relevant notes of proceedings were agreed by the appellant. And in this regard, the learned SCJ clearly had stated in his grounds of judgment that the notes of proceedings were agreed by both parties. The appellant obviously could not object on these notes because he had agreed to the notes of proceedings. It is also obvious the appellant could only agree on the notes when it were already prepared in the completed form. He would not have agreed if the notes were not complete. It should also be appreciated that the appellant was fully aware he was facing a serious charge that could be punished with imprisonment. Therefore, he must have viewed the notes of proceedings very carefully before he agreed to the same. In that regard, the learned High Court could not be wrong to find that the learned SCJ had ascertained the accuracy and reliability of such transcript or notes of proceedings. This is because the learned SCJ had greatly been assisted in determining the accuracy and reliability of such transcript or notes of proceedings because the appellant himself had agreed to these notes. The learned SCJ was aptly rest assured on the accuracy and reliability of the notes because the appellant himself had unselfishly agreed to these notes. And the appellant was assisted by competent counsel before he agreed to the notes. The appellant agreed to these notes too knowing fully well he could use these notes for his defence.

[45] In respect of this first issue too, the learned HCJ was not wrong to say that in reference to s 272F(3) of the CPC, what is required of the learned SCJ was only to ascertain the accuracy and reliability of the notes of proceedings. And in this regard, the learned HCJ was correct in finding the learned SCJ had indicated he will only be relying on the agreed notes of proceedings before making his decision.

[46] The learned HCJ also correctly found there were essentially two sets of notes of proceedings. The first was rightly signed and certified by the learned SCJ. It was accompanied by the grounds of judgment of the learned SCJ and the notes were transcribed by the sessions court. The notes were also sent to the appellant's solicitors on 21 June 2016.

[47] There is also no reason to disturb the finding of the learned HCJ that the second set of notes of proceedings were included in the record of appeal prepared by the sessions court. This set was the agreed notes between the parties. This agreed notes came as the case was technical and parties had also agreed to the same for the purpose of preparing written submissions by both sides.

[48] In respect of the second set of notes of proceedings too, the learned HCJ could not be wrong to find that these notes were to be used in the appeal based on corrections if any to perfect the notes (p 24 of the learned HCJ's grounds of

judgment). The learned HCJ also could not be wrong to find that the second set of notes of proceedings was substantially only to improve and correct grammatical errors. In this regard, it is indeed not uncommon for the appeal record to be corrected to reflect the actual evidence tendered. This certainly does not mean the relevant notes of proceedings were not referred at all by the sessions court.

[49] There is also no dispute that it took more than one year between the conclusion of the trial and the decision given by the learned SCJ. Therefore, it was also correct for the learned HCJ to find this was because the parties were working together and needed much longer time to ensure the finality of the correct, accurate and complete notes of proceedings for authentication by the learned SCJ.

[50] We are satisfied that the learned SCJ had referred to the complete notes of proceedings in convicting and sentencing the appellant. We agree that this is proven when the learned SCJ had used technical terms in his grounds of judgment. These technical terms were obtained and reflected in the complete notes of proceedings. Without the complete notes of proceedings, it would not be possible for the learned SCJ to use these technical terms in his grounds of judgment. Besides, as rightly submitted by the respondent, the learned SCJ was the only judge presiding over the entire defence case. He therefore, had the benefit of hearing the whole of the defence's case. There could also not be an issue of incomplete notes because the CRT system showed that the complete notes of proceedings were referred during the submissions stage by both parties and also during clarification before the learned SCJ.

[51] It is also not wrong for the learned HCJ to find and note that the learned SCJ in his grounds of judgment had stated before making his decision, he had the agreed set of notes of proceedings. Therefore, the learned HCJ found the appellant erred to contend that the learned SCJ had not directed his mind to the correct set of notes of proceedings.

[52] In respect of the second issue narrated above, the learned HCJ also did not err, in reference to s 272F(4) of the CPC, to find that this provision does not state how the transcript (notes of proceedings) ought to be signed. This statutory provision also does not state whether it must be signed at the end of every trial. The authentication in this regard under s 274(4) of the CPC is only for the signature or even just an acknowledgment in any form by the learned SCJ on the notes of the proceedings. We are of the considered view that it is acceptable for just one signature or acknowledgement in any form of the learned SCJ for all these notes of proceedings.

[53] There is a case not cited by the parties in this case that could throw some light on the meaning of the word 'authenticated'. This word also appears as shown in s 272F(4) of the CPC as narrated earlier. In the case of *Home v Hardy* 1842 D 261 it was held that word does not even necessarily entail a signature of the person concerned. In interpreting this word, Lord Justice Clerk in this case said:

> Then, what is the import of the term, 'authenticated by the Lord Ordinary by his signature?' The argument of the defender assumes that this expression was equivalent to identify or mark. I do not think that this is a correct interpretation; it is not either the correct or the vernacular sense of the term 'authenticated'. I find no such meaning given to the term in any dictionary, English, French, or Latin, It is not the legal sense of the term, and it was frequently used in former times. It is nut (sic) the French sense of the term, from which language the verb is derived. Neither does the addition, 'by his signature,' tend in any degree to alter the meaning of the word. I think the term is here employed most emphatically and appropriately in its correct and true meaning, viz, to make authoritative — to declare and prove to be genuine and authentic — to give to the record the authority and sanction which the statute intends, viz, to declare it to be the only and the final statement and record of the averments and pleas of the parties ...

[54] Likewise, noting the passage above and in reference to s 272F(4) of the CPC that speaks of the notes of proceedings being authenticated by the signature of the learned SCJ, we find that the signature of the same signifying authentication should be secondary to the act of declaring the notes are indeed genuine and authentic. The authoritative certification of the correctness of the notes of proceedings in that sense becomes more relevant in this respect. There should not be any doubt on this as the notes of proceedings, as stated have been agreed. Furthermore in this case it could not be disputed the learned SCJ did authenticate the notes of proceedings, albeit not for every trial date. In this regard, a case relevant by analogy to note is the case of *Set Kon Kim v Officer in Charge, Ceras Police Station* [1984] 1 MLJ 73. This is a case where an extradition order is sought against the applicant for him to be extradited to Australia to face several charges. The applicant resisted the order for extradition. One of the grounds by the applicant to object to the extradition was that each of the document from Australia implicating him must be authenticated in view of s 15 of the Extradition Ordinance 1958 which states as follows:

> Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Ordinance if authenticated in the manner provided for the time being by law or authenticated as follows:
>
> (a) if the warrant purports to be signed by a Judge, Magistrate or officer of the foreign country where the same was issued;

(b) if the depositions or statements or the copies thereof purport to be certified under the hand of a Judge, or officer of the foreign country where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require; or

(c) if the certificate of or judicial document stating the fact of conviction purports to be certified by a Judge, Magistrate or officer of the foreign country where the conviction took place;

and if in every case the warrants, depositions, statements, copies, certificates and judicial documents (as the case maybe) are authenticated by the oath of some witness or by being sealed with the official seal of the Minister of Justice or some other Minister of State. And all Courts in the Federation shall take judicial notice of such official seal and shall admit the documents so authenticated by it to be received in evidence without further proof.

[55] Mohamed Dzaiddin Abdullah J (later Chief Justice) in this case noted the documents came in one bundle and in delivering judgment on this point said:

In my judgment, after having addressed myself to the requirement of s 15 and its proper interpretation given, *the mode of authentication by affixing just one official seal to all the annexed documents is sufficient. In short, they were properly authenticated.* (Emphasis added.)

[56] By analogy, that judgment above supports our finding that the authentication need not necessarily be for every trial date as submitted by the appellant.

[57] In any event, the interpretations of ss 272F(3) and 272F(4) of the CPC as discussed above are to meet the demand of justice. We agreed with the respondent that the provisions of the CPC are not to be constrained by technicalities. This is succinctly explained by Mohd Noor Ahmad JCA in the Court of Appeal case of *Public Prosecutor v Ishak bin Hj Shaari & other appeals* [2003] 4 MLJ 585 as follows:

The CPC is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the CPC is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the CPC and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the CPC is based. The modern trend should be to swing away from technicality and a greater endeavour should be

made to regard the substance rather than the shadow and to administer justice fairly and impartially as it should be administered; fair to the accused person, fair to the State and fair to the society for whose protection penal laws are made and administered (see *Willie (William) Slaney*). In order to interpret s 422 the whole provisions of the CPC must be looked at in totality and the purposive approach should be adopted so as to promote the basic principle on which the CPC is based.

[58] The learned HCJ was also correct to find that the case of *Abdul Rahim Zamani*, was distinguishable in facts with the present case. In *Abdul Rahim Zamani*, indeed the notes of proceedings were different from the court recording transcription. However, in the present case, as rightly pointed out by the learned HCJ, there could not be a wrong reference to the relevant notes of proceedings because these notes had already been agreed by both parties, including not least, the appellant himself. In fact, the learned SCJ as found by the learned HCJ, had endorsed his signature on the last two dates of the trial (p 24 of the learned HCJ's grounds of judgment).

[59] Likewise, the learned HCJ was not wrong to find the cases of *R v Payne*, was also distinguishable on facts. In this English case, though as explained by the learned HCJ the notes were inadequate and the recording of such notes was not accurate, these facts were not similar with the present case. This is because again, parties agreed to the notes. Thus, there is no question that the notes were not accurate and inadequate. If the notes were indeed not accurate and inadequate, the appellant would not have agreed to the same.

[60] Similarly, the learned HCJ also correctly found the case of *Lipa ak Liban* should not be followed as in this case the supplementary record of appeal was incomplete because the amended charge was not included in that record of appeal. However, in the present case, the appeal records could not similarly be said to be incomplete because the notes of proceedings had indeed been agreed by both parties. And there is no issue that these notes had not been included in the appeal records.

[61] Whether there were two sets of notes of proceedings also becomes immaterial because in the present case, both parties had agreed to the relevant notes of proceedings which were then used for submissions by both parties before the decision of the case was delivered. And as explained, the learned SCJ also had indicated he was using the agreed notes of proceedings in arriving at his decision. There is no reason to doubt this statement of the learned SCJ and in fact, the appellant too admirably did not cast any aspersion on this statement.

[62] In essence there is no reason to say the learned HCJ was wrong to find that the learned SCJ had relied on the correct set of notes of proceedings when

he decided the case. The learned HCJ was also right to find the notes of proceedings the learned SCJ relied in making his decision were the correct, accurate and authenticated notes. Therefore, both ss 272F(3) and (4) of the CPC have been complied by the learned SCJ.

[63] Also relevant to bear in mind, as indicated, the application for revision was filed by the appellant pursuant to ss 31 and 35 of the CJA. Section 31 of the CJA states as follows:

> The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.

[64] Section 35 of the CJA in turn reads as follows:

> (1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.
>
> (2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court.

[65] What is of relevance to note regarding the above is whether the appellant could appeal to the Federal Court against our decision here, bearing in mind the revision came from the High Court. For this, first we must look at s 87(1) of the CJA that states as follows:

> *The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction* subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal. (Emphasis added.)

[66] As seen in the above provision, the matter that can be appealed against our decision to the Federal Court is only if the criminal matter was decided and came from the High Court in its original jurisdiction. In this regard, the revision is not in the criminal original jurisdiction of the High Court. The revision arose from the decision of the sessions court in its original criminal jurisdiction. Thus, there is no right of appeal to the Federal Court against our decision.

[67] We are supported in this proposition by the Federal Court case of *Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101; [2007] 1 CLJ 565. Similarly, in this case the revision came from the High Court pursuant to s 31 of the CJA and the decision in that revision by the High Court was affirmed by the Court of Appeal. The Federal Court said that the accused in this case could not appeal against the decision of the Court of Appeal. This is because when the case came before the Court of Appeal, it came not because of the High Court's original jurisdiction but revisionary jurisdiction against the original jurisdiction of the sessions court. Therefore s 87(1) of the CJA as narrated above has not been complied. Richard Malanjum CJ (Sabah and Sarawak) (later Chief Justice) in this case said:

> My answer therefore to the primary question is that an exercise of revisionary power by a High Court judge is not an exercise of an original jurisdiction so as to bring it within the ambit of s 87 of the CJA.
>
> For the above reasons the notice of appeal filed by the accused in this court is therefore struck out for want of jurisdiction under s 87 of the CJA.

[68] Further, as explained earlier, the main prayer for the revision in this application is for the records of proceedings of the sessions court to be called for the High Court to determine whether the appellant's conviction and sentence had been correctly done. This, as indicated, had been examined correctly by the learned HCJ. However, this revision with respect is also a backdoor approach to question the conviction and sentence because the propriety of that conviction and sentence should be pursued and is indeed the subject of the appeal proper already lodged by the appellant. By filing this application, the appellant will have another chance to question the conviction and sentence if he fails in the application because he can then pursue the issue of his conviction and sentence at the appeal proper. Therefore, it is only appropriate and proper for this court to be vigilant in reviewing the nature of the application. Although the appellant could file the application, such application must be scrutinised accordingly, so that any one party will not use such application indirectly to gain unfair advantage and thereby undermining the administration of justice meant for all.

[69] In fact, in this regard, a relevant case not cited by the respondent at the High Court and in this court, although relevant is the Court of Appeal case of *Muzammil Izat bin Hashim v Public Prosecutor* [2003] 6 MLJ 590; [2009] 2 CLJ 354. This is a case where Hasan Lah JCA (later FCJ) in delivering judgment, approvingly referred to the case *Dorai Manickam alias Davis v Rex* [1936] 1 MLJ 209 that decided a revision is not to be exercised when there is a right to appeal. In *Muzammil* it is said as follows:

> Suffice to say that it has been accepted as settled law that except for very good reasons the High Court should not exercise its revisionary powers when a decision complained of is appealable ...

[70] Therefore, such application should not be used and filed willy-nilly. The Supreme Court in the case of *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69; [1987] 1 CLJ 35 in this regard said as follows:

> *The power of revision is therefore to be used sparingly* and should remain a discretionary power to be exercised primarily for purposes of correcting a miscarriage of justice. (Emphasis added.)

[71] Such revision is normally requested only to determine the correctness of conviction and sentence. The revision is not usually meant to be applied when there is an appeal against conviction and sentence as in this case. Normally such revision is only applied to avoid grave injustice from happening considering the exigency of time. In this regard the Federal Court in *Tan Sri Eric Chia* said as follows:

> It has been said that a revision is not a right and is only a procedural facility afforded to a party, while an appeal is a statutory right conferred on a party. It is only a step-in-aid for invoking the powers of superintendence by the sessions judge and the High Court for correcting irregularities if any, in the judgments and orders of the subordinate courts.

[72] The issue raised on the notes of proceedings here, equally and effectively could be raised in the appeal proper of this case in the High Court. There should be no bar in the appeal proper for the appellant to raise the issue regarding the notes of proceedings and submit that this issue would mean his conviction and sentence is unsafe to be affirmed by the High Court.

[73] The only drawback to this, probably is the delay in raising this issue in the petition of appeal for conviction and sentence as pointed out by the respondent when the respondent raised the preliminary objection to oppose the application at the High Court. But even if there is such a delay, this should not hinder the appellant in filing an application to amend the said petition of appeal to include this issue regarding the notes of proceedings. In any event, if the appellant indeed had failed to raise this point in the petition for the appeal, that is a matter to be decided at the appeal proper at the High Court.

[74] By filing this application, the appellant also chose to take a longer route in disposing his case at the appellate stage. In a way, with respect the appellant had on his own, caused more time than necessary for the appeal of his case to be heard at the High Court.

[75] In respect of the appellant's submission that he should be acquitted and discharged instead of proceeding with the appeal proper, as explained, there is no reason to accede to the application itself. Therefore, the issue of the appellant being acquitted and discharged of the charge does not arise.

[76] Further, as stated, the appellant himself chose to take the longer route by filing the application instead of immediately proceeding with the appeal proper. In that sense, his complaint that he has faced the charge for many years and it will take some more time for his case to be eventually disposed of, with respect seems misplaced. As he had chosen the longer route, he had with respect, brought this predicament regarding time, onto himself.

[77] Besides, balancing his interest with the interest of the state, it would not be proper and appropriate to acquit and discharge him at this stage. After all, there is still the possibility he could well succeed in the appeal proper to overturn the conviction and sentence against him.

CONCLUSION

[78] Based on all the reasons above, we are unanimous in dismissing the appellant's appeal. The learned HCJ's decision is accordingly affirmed.

Appeal dismissed.

Reported by Mohd Kamarul Anwar